Office-Supreme Court, U.S.
FILED
NOV 21 1984
CLERK

No. 84-623

In the Supreme Court of the United States

October Term, 1984

CINCINNATI BELL TELEPHONE COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,
Appellees.

ON APPEAL FROM
THE SUPREME COURT OF OHIO

REPLY BRIEF OF APPELLANT CINCINNATI BELL TELEPHONE COMPANY TO MOTIONS TO DISMISS OR AFFIRM

DONALD McG. ROSE
2500 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800
Counsel of Record for Appellant Cincinnati Bell Telephone Company

Of Counsel:
WILLIAM D. BASKETT, III
MARK H. LONGENECKER, JR.
DAVID C. HORN
GARY A. GARFIELD
FROST & JACOBS
2500 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

I. Introduction 1

II. The Ohio Supreme Court's Refusal to Give Res Judicata Effect to the Judgment of the United States Court of Appeals for the Fourth Circuit 1

III. The Ohio Supreme Court's Failure to Comply With the Supremacy Clause and, Therefore, Give Effect to the FCC's Preemption Order 5

IV. Conclusion 9

TABLE OF AUTHORITIES

Cases

Bacon v. Rutland Railroad Company, 232 U.S. 134 (1914) 2

Brown v. Board of Education, 347 U.S. 483 (1954) 6

Claflin v. Houseman, 93 U.S. 130 (1876) 7

Cooper v. Aaron, 358 U.S. 1 (1958) 6, 7

Crescent City Live-Stock Co. v. Butchers' Union, 120 U.S. 141 (1887) 3-4

Detroit & Mackinac Railway Company v. Michigan Railroad Commission, 235 U.S. 402 (1914) 2

Efros v. Nationwide Corp., 12 Ohio St. 3d 191, 193, 465 N.E.2d 1309, 1311 (1984) 3

Fidelity Federal Savings & Loan Association v. de la Cuesta, 458 U.S. 141 (1982) 7

Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246 (1818) 4

Marine Engineers Beneficial Association v. Interlake Steamship Company, 370 U.S. 173 (1962) 7-8
Market Street Railway Company v. Railroad Commission, 324 U.S. 548, 551-552 (1945) 5
Mondou v. New York, New Haven & Hartford Railroad Co., 223 U.S. 1, 57 (1912) 7
Myers v. International Trust Company, 263 U.S. 64 (1923) 4
Napa Valley Electric Company v. Railroad Commission, 251 U.S. 366 (1920) 2
Old Colony Trust Company v. Commissioner of Internal Revenue, 279 U.S. 716, 728 (1929) 3
Prentis v. Atlantic Coast Line Company, 211 U.S. 210 (1908) 2
Social Security Bd. v. Nierotko, 327 U.S. 358 (1946) 7
Stoll v. Gottlieb, 305 U.S. 165 (1938) 3
Stout v. Lye, 103 U.S. 66, 68 (1881) 3
Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) 2
Testa v. Katt, 330 U.S. 386 (1947) 7
Virginia State Corporation Commission v. Federal Communications Commission, 737 F.2d 388 (4th Cir. 1984) (Motion for Rehearing En Banc denied) 1

Constitutional Provisions

U.S. Cons. art. VI, para. 2 8

Statutes

28 U.S.C. section 2342(1) 2
47 U.S.C. section 402(a) 2

Other Authorities

18 C. WRIGHT, A. MILLER AND E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4468, at 648 3

Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 749 (1976) 3

I. INTRODUCTION

Cincinnati Bell Telephone Company ("Cincinnati Bell") submits this brief in opposition to the motions to dismiss or, in the alternative, to affirm filed by appellants The Public Utilities Commission of Ohio (the "PUCO") and the Office of the Consumers' Counsel (the "OCC"). The PUCO's and OCC's motions should be denied because, as explained below, their positions on the issues presented for this Court's review are contrary to fundamental precepts of the Constitution of the United States and cases decided by this Court. Further, because the Ohio Supreme Court openly refused to apply both federal law and the Constitution of the United States, and the dangerous precedent that Court's decision would establish, this Court should either summarily reverse the decision below or set this case for full briefing and argument.

II. THE OHIO SUPREME COURT'S REFUSAL TO GIVE RES JUDICATA EFFECT TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The PUCO and the OCC offer numerous excuses for the Ohio Supreme Court's refusal to give res judicata effect to the Fourth Circuit's decision in *Virginia State Corporation Commission v. Federal Communications Commission,* 737 F.2d 388 (4th Cir. 1984) (Motion for Rehearing En Banc denied). These excuses are without merit.

First, the PUCO and OCC argue that the Fourth Circuit judgment in reviewing the FCC's Preemption Order is not entitled to res judicata effect because the Preemption Order was legislative in nature. PUCO's motion at 11,

OCC's motion at 14-18.[1] On two occasions this Court has held that a state court's review of a rate-making order, legislative in nature, is entitled to res judicata effect. *Napa Valley Electric Company v. Railroad Commission*, 251 U.S. 366 (1920); *Detroit & Mackinac Railway Company v. Michigan Railroad Commission*, 235 U.S. 402 (1914). *See generally Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958). In each case the Court explained that a judgment of a state court reviewing an administrative agency's rate order is entitled to res judicata effect where the court is vested by the legislature with the judicial function of reviewing the validity of the rate. It is only where the court is given the legislative function of establishing a valid rate order that its decision may not have res judicata effect.[2]

In granting to the Court of Appeals exclusive jurisdiction to review FCC orders under 28 U.S.C. section 2342(1) and 47 U.S.C. section 402(a), Congress vested the Court of Appeals only with the judicial function of determining the validity of FCC orders. The PUCO admits this in its motion to dismiss: "The Fourth Circuit Court of Appeals only has authority to engage in the limited activity of judicial review. 47 U.S.C. § 402(a) and 28 U.S.C. § 2341 et seq." PUCO's motion at 11. Moreover, a congressional attempt to vest an Article III court with the legislative

---

1. But see Cincinnati Bell's Jurisdictional Statement at 5 n.1.

2. In *Prentis v. Atlantic Coast Line Company*, 211 U.S. 210 (1908), the Court in dicta said that the Virginia Supreme Court of Appeal's review of a rate order would not be res judicata because the Virginia legislature vested the Court with the legislative power of substituting "such [rate] order as, in its opinion, the commission should have made." *Id.* at 224. Justice Holmes, writing for the Court, said that the Virginia Constitution "unite[d] legislative and judicial powers in a single hand." *Id.* at 225. For a discussion of this aspect of the *Prentis* case see Justice Holmes' unanimous opinion in *Bacon v. Rutland Railroad Company*, 232 U.S. 134 (1914).

power of establishing an FCC order would be highly suspect under the separation of powers doctrine.

Second, the PUCO argues that the Fourth Circuit decision was not binding because its decision was issued after the case below was briefed and argued. That is not the law. The law is that where parties are engaged in litigation involving the same subject matter at the same time in different courts, a judgment in one on the merits becomes res judicata as to the other. *Old Colony Trust Company v. Commissioner of Internal Revenue*, 279 U.S. 716, 728 (1929); *Stout v. Lye*, 103 U.S. 66, 68 (1881); *Efros v. Nationwide Corp.*, 12 Ohio St. 3d 191, 193, 465 N.E.2d 1309, 1311 (1984). In the case at bar, the Fourth Circuit decision was issued five weeks prior to the Ohio Supreme Court's decision and thus is binding on the Ohio Supreme Court.

Third, the PUCO argues that federal court judgments are only entitled to res judicata effect in state courts when the federal court is sitting by diversity jurisdiction as a state court. This proposition is "unthinkable" in our system of federalism. 18 C. WRIGHT, A. MILLER AND E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4468, at 648; *see also* Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 749 (1976). Moreover, this Court has repeatedly applied res judicata to federal court judgments when the federal court was not sitting by diversity jurisdiction. *See Stoll v. Gottlieb*, 305 U.S. 165 (1938);[3] *Crescent City Live-Stock Co. v. Butchers' Union*, 120 U.S.

---

3. The PUCO at page 13 n.10 of its motion grossly misstates Professor Degnan's discussion of the *Stoll* case contained in *Federalized Res Judicata*, 85 YALE L.J. 741, 749 (1976). In fact, Professor Degnan manifestly agrees with the result in *Stoll*. He even says that the principle that federal court decisions are entitled to res judicata in state courts is "indispensable to federalism." *Id.* at 749.

141 (1887); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246 (1818). *See also Myers v. International Trust Company*, 263 U.S. 64 (1923).

The PUCO and the OCC both argue that the issue of the res judicata effect of the Fourth Circuit judgment was not raised below. This is not true as demonstrated in the section entitled "Raising the Questions Below" in Cincinnati Bell's Jurisdictional Statement at pages 14-16.

The PUCO and the OCC also assert that Cincinnati Bell should have moved for a rehearing in the Ohio Supreme Court in light of the Fourth Circuit decision. In fact, the PUCO misrepresents the statement of Justice William B. Brown of the Ohio Supreme Court in his dissent as inviting Cincinnati Bell to move for a rehearing. PUCO's motion at 7. To the contrary, Justice Brown urged the court to set the case for rehearing:

> [T]his court would be well-advised to set this cause for rehearing to allow the parties to rebrief and reargue orally the merits of this case in light of the decision rendered by the federal court.

Appendix to Jurisdictional Statement at A22.

Chief Justice Celebrezze in his concurring opinion said he "cannot agree with the dissenters that a rehearing in this court or continuance of the stay will resolve the question." Appendix to Jurisdictional Statement at A20. In the same paragraph Chief Justice Celebrezze acknowledged the Fourth Circuit decision. In light of these opinions, it is apparent that a motion for rehearing would have been futile. If Justice Brown could not persuade a majority of the court to set the cause for rehearing, there is no reason to believe that Cincinnati Bell would have been successful if it had filed such a motion.

Further, a motion for rehearing was not feasible. The decision of the Ohio Supreme Court dissolved an existing stay. Upon Cincinnati Bell's application, a stay was granted by the Chief Justice of the United States. If Cincinnati Bell had filed a motion for rehearing instead of a notice of appeal, it could not have sought a stay from this Court and would have suffered irreparable harm.

Finally, a motion for rehearing is not essential to vest this Court with jurisdiction. *Market Street Railway Company v. Railroad Commission*, 324 U.S. 548, 551-552 (1945).

III. THE OHIO SUPREME COURT'S FAILURE TO COMPLY WITH THE SUPREMACY CLAUSE AND, THEREFORE, GIVE EFFECT TO THE FCC'S PREEMPTION ORDER

The PUCO does not address the Ohio Supreme Court's failure to comply with the Supremacy Clause. The OCC argues that there is no federal question presented by this appeal because the Ohio Supreme Court only decided the reasonableness of the PUCO order under Ohio law and did not address the lawfulness of the order under federal law. OCC's motion at 18-21. This argument is without merit.

Cincinnati Bell appealed from the PUCO to the Ohio Supreme Court on the basis that the PUCO and the Ohio Supreme Court were required to give effect to the Preemption Order. Cincinnati Bell's Jurisdictional Statement at 2, 11-12, 16-17; Appendix to Jurisdictional Statement at A199.[4] To argue, as does the OCC, that the Ohio Supreme

---

4. Contrary to the claims of the PUCO and the OCC, this question was presented below as explained in the section "Raising the Questions Below" in Cincinnati Bell's Jurisdictional Statement at pages 16-17.

Court ignored federal law and instead only applied state law misses the point. The point is that the Ohio Supreme Court was bound by the Supremacy Clause of the Constitution of the United States to consider the federal question properly before it and to proceed to give effect to the Preemption Order. If the law were otherwise, a state would be free to ignore federal law anytime the state disagreed with that law. The result, if carried to its conclusion, would negate the Supremacy Clause.

Indeed, the OCC's argument is, in a horrifying sense, akin to the argument of some states that they were not bound to follow this Court's landmark desegregation decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). The refusal of the state of Arkansas to abide by the *Brown* case presented a constitutional crises and was brought before the Court in the case of *Cooper v. Aaron*, 358 U.S. 1 (1958). In an opinion by all members of the Court, it was said:

> [W]e should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.
>
> * * * * *
>
> Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. 6, cl. 3, "to support this Constitution." Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State. . . ." *Ableman v. Booth* (US) 21 How. 506, 524, 16 L. ed 169, 176.

> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery. . . ." *United States v. Peters* (US) 5 Cranch 115, 136, 3 L. ed 53, 59.

Id. at 17-18.

As demonstrated by *Mondou v. New York, New Haven & Hartford Railroad Co.*, 223 U.S. 1, 57 (1912), the principles of *Cooper* apply with equal force to acts of Congress as to decisions of federal courts. *See also Testa v. Katt*, 330 U.S. 386 (1947); *see generally Claflin v. Houseman*, 93 U.S. 130 (1876). Further, federal administrative orders such as the Preemption Order are also laws within the meaning of the Supremacy Clause and become the law of the land.[5] *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141 (1982); *Marine Engineers*

---

5. The OCC argues at page 20 of its motion that "a federal administrative agency cannot preempt state legislation based simply on its own motion," citing *Social Security Bd. v. Nierotko*, 327 U.S. 358 (1946). The OCC's citation of *Nierotko* is improper as *Nierotko* involved neither supremacy nor preemption of state legislation. This Court has repeatedly held that federal agencies may preempt state legislation provided the agency is acting within its authority. *See, e.g., Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141 (1982). The Fourth Circuit explicitly held that the FCC acted within its authority in issuing the Preemption Order. The only issues in this case are (1) whether the Ohio Supreme Court was bound to give res judicata effect to the Fourth Circuit judgment and (2) whether, apart from res judicata, the Supremacy Clause required the Ohio Supreme Court to give effect to the Preemption Order because it lacked jurisdiction to review the validity of that order.

Beneficial Association v. Interlake Steamship Company, 370 U.S. 173 (1962).

Thus, a state court cannot, as did the Ohio Supreme Court, simply ignore federal law and thereby avoid the federal question. The Constitution and laws of the United States are "the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Cons. art. VI, para. 2. If the Ohio Supreme Court may simply ignore the FCC's Preemption Order, then the Supremacy Clause is meaningless. Instead of a union of states, we would be a compact of states, each free to follow its own will without the controlling and unifying force that the Supremacy Clause now provides. For these reasons, the Framers drafted the Supremacy Clause and this Court has repeatedly held that the several states are bound by it to apply federal law. The Ohio Supreme Court's failure to apply federal law—the Preemption Order—was in error.

IV. CONCLUSION

For the reasons stated above, the PUCO's and the OCC's motions should be denied and, as requested in Cincinnati Bell's Jurisdictional Statement, this Court should either summarily reverse the decision below or set the case for plenary consideration.

DONALD McG. ROSE
2500 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800
Counsel of Record for
Appellant Cincinnati Bell
Telephone Company

Of Counsel:
WILLIAM D. BASKETT, III
MARK H. LONGENECKER, JR.
DAVID C. HORN
GARY A. GARFIELD
FROST & JACOBS
2500 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800